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PROJEK LEBUHRAYA USAHASAMA BHD v. SIN-KUNG LOGISTICS (KL) SDN BHD

HIGH COURT MALAYA, SHAH ALAM
AKHTAR TAHIR J
[WRIT NO: 22-334-2006]
B 31 AUGUST 2017

STATUTORY INTERPRETATION: *Construction of statute – Intention of Parliament – Federal Roads (Private Management) Act 1984 – Whether Act intended to make only users of highway liable to pay tolls – Whether owners of*
C *vehicles vicariously liable for failure of employees/drivers to pay toll – Whether common law principle of vicarious liability could be imported into Act to make owners of vehicles liable*

The plaintiff, a concession holder of express highway and authorised under
D Federal Roads (Private Management) Act 1984 to collect toll payment from users of the highway alleged that the defendant was vicariously liable for allowing the drivers using the defendant's vehicle to evade partial or full amount of toll payable amounting a total sum of RM518,369.27. Initially, the High Court ruled in favour of the defendant applying the case of *Projek Lebuhraya Utara Selatan v. Permas Forwarding Agency Sdn Bhd* where it was
E held that toll payment could only be collected from the users, the highway concessionaire could not collect toll payments from the vehicle owners and the common law principle of vicarious liability did not apply. Being dissatisfied, the plaintiff filed an appeal to Court of Appeal. The Court of Appeal allowed the said appeal and directed the matter to be proceeded with
F continued trial at the High Court. The defendant then filed leave to the Federal Court. The leave to the Federal Court was however disallowed. Subsequently, the case was remitted to be tried by the High Court. The thrust of the defendant's argument was that the defendant could not be vicariously liable for the non payment of toll. The basis for the defendant disputing
G liability was the fact that only the users of the highway were subject to the payment of the toll and not the employers. The defendant's contention was premised upon s. 8(1) and (2) and s. 2(1) of the Federal Roads (Private Management) Act 1984 ('the Act'). The defendant further submitted that although the word 'user' was not defined in the Act, the definition of the
H word 'user' in a comparable Act *ie* the Highway Authority Malaysia (Incorporation) Act 1980 in s. 2 defines 'user' as ' any person who drives or operates any vehicle on the highway'. In reply to the defendant's contention the plaintiff stressed that payment of toll was a statutory duty imposed upon the users of the highway and the drivers being employees of the defendant had breached the statutory duty to pay the toll. The plaintiff further, relying

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on the case of *Majrowski v. Guys and St Thomas' NHS Trust* submitted that vicarious liability was not confined to common law claims but also to breach of statutory duty. The issue that arose for determination, *inter alia*, was whether the defendant could be vicariously liable towards the plaintiff.

Held (allowing plaintiff's claim with costs):

(1) Reading in between the two decisions in *Projek Lebuhraya Utara Selatan v. Permas Forwarding Agency Sdn Bhd* and *Majrowski v. Guys and St Thomas' NHS Trust* it could be inferred that the two decisions were not in tandem. Therefore, this court was at liberty to rely on any one of them. In this case, the court agreed with the second Court of Appeal decision which stated that vicarious liability is a common law concept. The common law principle of vicarious liability was in existence even before any statutory provision to collect revenue. It therefore followed that the decision in *Majrowski v. Guys and St Thomas' NHS Trust* is a better statement of law that the general rule that the employer is liable vicariously for any wrongdoing of its employee unless the statute itself absolves the employer from liability. (para 31)

(2) In this case, the Act did not in any way absolve the employer from vicarious liability and in fact the phrase 'user' should include the employer as the actual user of the highway was the vehicle which belonged to the defendant. The drivers were merely employed to facilitate the business of the defendant by driving the vehicles. Therefore, the defendant was vicariously liable for the violation of its drivers if it was proven that the drivers had failed to pay or had not paid the full amount of the toll. (paras 32 & 33)

Case(s) referred to:

Chandran G Nair & Ors v. Affin Bank [2014] 1 LNS 569 CA ***(refd)***
Majrowski v. Guys and St Thomas' NHS Trust [2005] QB 848 ***(foll)***
Projek Lebuhraya Utara Selatan v. Permas Forwarding Agency Sdn Bhd [2013] 1 LNS 1529 CA ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 61, 62, 73A
Federal Roads (Private Management) Act 1984, ss. 2(1), 8(1), (2)
Highway Authority Malaysia (Incorporation) Act 1980, s. 2
Rules of Court 2012, O. 33 r. 2

For the appellant/defendant - Elaine Gan & Diana Ling; M/s Elaine & Diana
For the respondent/plaintiff - Thirunaaukarasu Thoppasamy & Jegatish Kumar Kasavan; M/s Thiru Jegatish & Assocs

Reported by Sandra Gabriel

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JUDGMENT

Akhtar Tahir J:

Background

[1] The plaintiff is a concession holder of an express highway authorised
B under Federal Roads (Private Management) Act 1984 to collect toll payment from users of the highway.

[2] The plaintiff alleges that the defendant is vicariously liable for allowing the drivers using the defendant's vehicle to evade partial or full amount of toll payable amounting to a total sum of RM518,369.27 when
C exiting the plaintiff's constructed toll booths.

[3] The matter went for trial and after 65 witnesses had testified, the learned judge of the High Court ordered the plaintiff to file an application under O. 33 r. 2 of Rules of Court 2012 for the determination of a question
D of law in light of the Court of Appeal's decision in *Projek Lebuhraya Utara Selatan Bhd v. Permas Forwarding Agency Sdn Bhd* [2013] 1 LNS 1529; [2014] 2 MLJ 893. In that case, the Court of Appeal ruled that toll payment could only be collected from the users and the highway concessionaire could not collect toll payments from the vehicle owners and the common law principle of vicarious liability does not apply.
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[4] On 6 February 2014, the learned judge of the High Court ruled in favour of the defendant and dismissed the plaintiff's claim in its entirety. Being dissatisfied, the plaintiff filed a notice of appeal to Court of Appeal. The Court of Appeal on 25 September 2014, through a unanimous decision,
F allowed the said appeal and directed the matter to be proceeded with continued trial at the High Court. The defendant then filed leave to the Federal Court.

[5] The leave to the Federal Court was disallowed and the parties also failed to resolve and settle the matter by way of mediation. The defendant
G then orally requested the case to be transferred to the Sessions Court in view of the amount of the claim no longer being within the monetary jurisdiction of the High Court after the enforcement of the Rules of Court 2012. The learned High Court Judge allowed the application and directed the case to be transferred to the Sessions Court Shah Alam.

H **[6]** An appeal was filed by the plaintiff against the decision of the High Court in allowing the case to be transferred to the Sessions Court. The Appeal of the plaintiff was allowed by the Court of Appeal and the case was remitted to be tried by the High Court.

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[7] This High Court was assigned to continue the hearing of the case whereby 65 witnesses had already testified. The plaintiff informed the court that another 570 witnesses will be called to testify.

[8] The court proceeded with the trial of the matter and heard the testimony of another 122 witnesses. The 122 witnesses were employees of the plaintiff working as toll booth operators at the material time at the various toll booths constructed by the plaintiff at the highways. The rest of the plaintiff's witnesses as informed by the plaintiff's counsel were also toll booth operators employed by the plaintiff at the material time to man the tool booths of the plaintiff.

[9] The evidence of the 122 witnesses called was the same and that all of them consistently testified that upon any vehicle passing the toll booth where the driver did not pay the toll or only made a partial payment of the toll they will immediately fill up a form called the PV form. The details in the PV form, amongst others, consisted of the number plate of the vehicle and the type of violation committed by the driver. The types of the violation were categorised in the forms whereby the toll booth operator will tick the relevant violation. All the 122 witnesses also testified that upon a violation being committed they would inform their various supervisors assigned to their toll booth. It is the supervisors who would take further action including printing a CCTV footage of the vehicle committing the violation.

[10] After hearing the evidence of these 122 witnesses, the court concluded that the role of the toll booth operators was limited to filling up the PV forms when a vehicle violated the payment of toll when passing the toll booth.

[11] Just as the testimony of the 122 witnesses was the same, so were the questions posed during cross examination by the defendant's counsel. The defendant's counsel posed 4 or 5 same questions to each and every one of the 122 witnesses to which the 122 witnesses gave the same answers.

[12] For purposes of clarity, all the questions posed and the answers given by the witnesses will be set out here. Firstly, all the 122 witnesses disagreed with the defendant's counsel suggestion that they did not fill up the PV form immediately on the occurrence of the violation. All the 122 witnesses were firm in their answers that they had filled up the PV form immediately and it took them two or three minutes to fill up the form and while they are filling the form the other vehicles had to wait.

[13] All the 122 witnesses were also firm in their answers that they had noted the number plates on the PV form having seen the number plates when the vehicle entered and exited the toll booth. Some of the witnesses saw the number plate once on entry or exit but all confirmed that they had seen the number plate clearly. Further, all the 122 witnesses testified that the toll

booth were well lighted and they could clearly see the number plates when challenged by the defendant's counsel that as many incidents of violation occurred early in the morning, they could not have seen the number plates clearly.

[14] All the 122 witnesses were also consistent in stating that they could not remember the weather condition at the time of violation or the colour of the vehicle or the details of the drivers apart from what had been noted in the PV form due to lapse of time and memory.

[15] It was indicated to the court that the same questions would be posed to all the other remaining witnesses by the defendant's counsel as all of them were also toll booth operators carrying out the same duties as the 122 witnesses. The court could not envisage that these other witnesses would drastically depart from the answers given by the 122 witnesses. It is pertinent to note that the defendant did not challenge the fact that the toll booth operators had filled up the PV forms, the challenge was more as to accuracy of the information contained therein.

[16] The court further notes that the primary evidence before the court is the PV forms. In this case, all the original PV forms filled by the respective toll booth operators were produced in court.

[17] Under s. 61 of the Evidence Act 1950, contents of document may be proven by primary evidence or secondary evidence. Under s. 62 of the Evidence Act 1950 primary evidence is where the original document is itself produced in court. For the sake of completeness, both these sections are reproduced and are as follows:

> Section 61
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> The contents of documents may be proved either by primary or by secondary evidence.
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> Section 62
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> Primary evidence means the document itself produced for the inspection of the court.

[18] There would be massive wastage of judicial time in going through the motion of hearing of all the 570 witnesses giving the same answers to the same questions. As a record, the court noted that only a maximum of 25 witnesses could be called a day. Wastage of time is not a prime consideration but a factor which the court can take into account in deciding upon a case.

[19] Section 73A of the Evidence Act clearly allows primary documents to be tendered without the necessity of calling the maker to court as a witness. Section 73A provides as follows:

(1) Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied:

(a) if the maker of the statement either:

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

(2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence:

(a) notwithstanding that the maker of the statement is available but is not called as a witness; and (emphasis mine)

(b) notwithstanding that the original document is not produced, if, in lieu thereof, there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.

(3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated, involving a dispute as to any fact which the statement might tend to establish.

A (4) For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document, or the material part thereof, was written, made or produced by him with his own hand, or was signed or initialled by him, or otherwise recognised by him in writing as one for the accuracy of which he is responsible.

B (5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of subsections (1) to (4), the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical C practitioner, and, where the proceedings are with assessors, the court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason, it appears to it to be inexpedient in the interests of justice that the statement should be admitted.

D (6) In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular, to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether E or not the maker of the statement had any incentive to conceal or misrepresent facts.

(7) For the purpose of any rule of law or practice requiring evidence to be corroborated, or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by this Act shall not be treated as corroboration of evidence given by the F maker of the statement.

In the case of *Chandran G Nair & Ors v. Affin Bank* [2014] 1 LNS 569 the court stated as follows on non calling of the maker of the document:

G 8.7. It is significant to note that for some untold reason the Respondent did not at any time attempt to rely on the provisions of Section 73A(2), which provides:

> (2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection H (1) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence:
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> (a) notwithstanding that the maker of the statement is available but is not called as a witness; and

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(b) notwithstanding that the original document is not produced, if, *in lieu* thereof, there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.

if indeed the Respondent was in such a position. For the learned trial Judge to act under Section 73A(2) it would have been imperative for the Respondent to move the Court to do so.

[20] Taking into consideration of the above provision of the Evidence Act 1950, I allowed all the PV forms to be marked as exhibits without the necessity of calling all the toll booth operators who had filled up the forms.

[21] It should be added here that the above ruling did not effectively mean that the plaintiff had proven its entire case on the balance of probabilities as there was still the evidence of the defendants to be taken into account. The court made the ruling based on the fact that sufficient evidence had been adduced by the 122 witnesses without hearing the rest of the witnesses to prove that the defendant's vehicle number plate as noted on the PV forms had not paid the toll or had not paid sufficient toll as required.

[22] The defendant was then permitted to adduce its evidence and proceeded to do so by calling one witness. This witness was in custody of the record of all the payment of highway tolls. He testified that the payments were made as a refund to the drivers upon the drivers producing receipts issued by the highway operator. The production of the receipt signified that the drivers had paid the toll at the plaintiff's toll booth. The defendant therefore denied that their drivers had failed to pay toll as claimed by the plaintiff.

Findings Of The Court

Vicarious Liability

[23] The thrust of the defendant's argument in this case is that the defendant cannot be vicariously liable for the non-payment of toll. The provision of the statute under which the plaintiff had brought this action did not provide for liability to owners of the vehicle.

[24] The issue of vicarious liability in this case has to be looked at from the background of certain undisputed facts. The first of this undisputed fact is that the 19 vehicles involved in the violation of the toll payment belonged to the defendants. The next undisputed fact is that all the drivers of the said vehicle committing the violation were the employees of the defendant.

[25] The basis for the defendant disputing liability is the fact that only the users of the highway are subject to the payment of the toll and not the employers. The defendant's contention is premised upon s. 8(1) and (2) and s. 2(1) of the Federal Roads (Private Management) Act 1984 (the Act) which reads as follows:

> (1) Any person who **uses** or attempts to use any road, bridge or ferry in respect of which an order under section 2 has been made without payment of the tolls prescribed in the order shall be guilty of an offence and shall, on conviction, be punished with a fine of not less than two thousand ringgit and not more than five thousand ringgit. (emphasis added)
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> (2) Notwithstanding subsection (1) tolls due and payable by virtue of an order made pursuant to section 2 may be recoverable by action at law by the person so authorised under the said section.

Section 2(1) reads as follows:

> (1) It shall be lawful for the Minister responsible for works by order published in the *Gazette* to authorise any person who has agreed to construct, re-construct, upgrade, repair or maintain any road, bridge or ferry which has been declared or is to be declared a Federal road, bridge or ferry under the Federal Roads Act 1959 **[Act 376]** or which is in any Federal Territory to demand, collect and retain tolls for such period as may be specified in the order **for the use** of such road, bridge or ferry by any person or class of vehicles. (emphasis added)

[26] The defendant further contends that the Minister in introducing the penalty section in s. 8 of the Act in the Parliament emphasised that the imposition of punishment was against the road users not paying the toll imposed. The speech of the Minister is reflected in the Hansard.

[27] Although the word "user" is not defined in the Act, the defendant submits that the definition of the word "user" in a comparable Act, the Highway Authority Malaysia (Incorporation) Act 1980 in s. 2 defines "user" as "any person who drives or operates any vehicle on the highway".

[28] In reply to the defendant's contention the plaintiff stresses that payment of toll is a statutory duty imposed upon the users of the highway and the drivers being employees of the defendant had breached the statutory duty to pay the toll. As such relying upon the English Court of Appeal and the House of Lord decisions in the case of *Majrowski v. Guys and St Thomas' NHS Trust* [2005] QB 848, [2006] 4 All ER 395 the plaintiff submits that vicarious liability is not confined to common law claims but also to breach of statutory duty.

More specifically the House of Lord states that it is the general rule that the employers are liable for wrongs committed by employees in the course of their employment and this general rule should apply in respect of wrong having a statutory source unless the statute displaces the general rule.

[29] In *Projek Lembaga Lebuhraya Utara Selatan Berhad v. Permas Forwarding Agency Sdn Bhd* a case which was relied upon earlier by the High Court Judge in dismissing the plaintiff's claim in this case, it was ruled that an employer cannot be liable on non-payment of toll by the employee. The case stated as follows:

> 11. Be that as it may, we agree with contention of learned counsel for the Respondent that whether the Respondent should be responsible for the unpaid tolls, regard must be given to the wordings of the provisions set out above. Section 8(2) is the primary provision and it makes mention of an order made pursuant to section 2. Reading sec 2 in its natural meaning, there is little doubt in our mind that the concessioners (in this case the Appellant) are empowered only to levy tolls on person who uses such road or in other words, the duty to pay is affixed on the users of the roads.
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> 12. It is also our view that had the legislature wanted to affix statutory liability on owners of vehicles using the roads, clearer words would have been used and that can be done by easily defining the word 'user' to include the registered owners of the vehicles. Further since there may be criminal element ramifications if we were to interpret the word 'user' to include the registered owner, we decline the invitation of the learned counsel Appellant to adopt his interpretation.

[30] However on appeal, the Court of Appeal in this case remitted this case back to the High Court deciding, *inter alia,* as follows:

> [6] In essence, the said judgment of the Court of Appeal says that toll can only be collected from users and the highway concessionaire cannot collect toll from the vehicle owners and the common law principles of vicarious liability will not apply.
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> [7] What the court has not decided in that case is whether an injunction can be ordered against the defendant to restrain the defendant's employees from using the highway without payment of toll. Payment of toll is a concept which was in existence in most of the common law jurisdiction without even any statutory right to collect revenue.
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> [8] It is also not clear from the Court of Appeal judgment if the defendant had authorised the employees to use the express highway and if so, whether the defendant will be obliged to pay the toll charges if the employees had not paid the toll charges at common law, and whether if the court condones such non-payment will result in unjust enrichment to the defendant.

[31] Reading in between the two Court of Appeal decisions, it can be inferred that the two decisions are not in tandem and therefore this court is at liberty to rely on any one of them. In this case, the court agrees with the second Court of Appeal decision which states that vicarious liability is a common law concept. This court notes that the common law principle of vicarious liability was in existence even before any statutory provision to collect revenue. It therefore follows that the House of Lord decision in *Majrowski*'s case *(supra)* is a better statement of the law, with the remedy that the general rule is that the employer is liable vicariously for any wrongdoing of its employee unless the statute itself absolves the employer from liability.

[32] In this case the Act does not in any way absolve the employer from vicarious liability and in fact the phrase "user" should include the employer as the actual user of the highway as the vehicle belongs to the defendant. The drivers are merely employed to facilitate the business of the defendant by driving the vehicles. Section 8 of the Act allows apart from imposing a criminal penalty to allow the tolls not paid to be recovered for the use of the road.

[33] The court therefore rules that the defendant is vicariously liable for the violation of its drivers if it is proven that the drivers have failed to pay or have not paid the full amount of the toll. This bring to fore the next issue as to whether the drivers had committed the violation alleged by the plaintiff?

Payment Of Toll

[34] In response to the plaintiff's documentary proof detailing the violation committed by the defendant's drivers in the PV forms, the defendant tendered as evidence receipts kept by their accounts department purportedly given by the drivers. The receipts according to the defendant were proof that the defendant had carried out its responsibilities in paying the highway tolls whenever their drivers submitted the toll receipts. The defendant however admitted they could not physically determine whether the drivers had actually paid the toll.

[35] Looking at the receipts it could be observed that the vehicle numbers were not printed on the receipt. The receipts cannot therefore disprove that the drivers had violated payment of the tolls on the date and time as stated in the PV forms. Some of the receipts coincided with the time and date of the alleged violation as stated in the PV forms but to the court this did not necessarily mean that the information in the PV forms was wrong. On the converse the receipts could have been obtained by the defendant's drivers elsewhere.

[36] On a final analysis the court accepts the accuracy of the contents of the PV form over the receipts produced by the defendant. The court makes a firm finding that the plaintiff has proven its claim on a balance of probabilities.

[37] A final matter on the payment of toll was the contention of the defendant that on the date of the alleged violation, the plaintiff had issued receipts for many of the vehicles showing full payment. This matter was explained by the plaintiff's witnesses that not all the drivers of the defendant's committing the violation had driven through the toll booth without stopping. There were many of the defendant's drivers who had stopped and given the toll ticket to the toll booth operators which were then fed by the toll both operators into their computer system. Once the ticket had been put into the computer the toll operators had to complete the transaction regardless of whether the toll had been paid or not. This was the reason the receipt which was subsequently issued showed full payment. This full payment was only on paper. The court accepted this explanation given by the plaintiff's witnesses.

Conclusion

[38] In the upshot the plaintiff's claim in para. 15(a) is allowed, with interest of 8% per annum from the date of filing until full settlement and costs of proceeding of RM100,000 to be paid by the defendant.